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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte D. KEITH JONES

Appeal 2008-4395
Application 09/954,838
Technology Center 3600

Decided:¹ March 20, 2009

Before LINDA E. HORNER, MICHAEL W. O'NEILL, and
STEFAN STAICOVICI, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*

DECISION ON APPEAL

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF THE CASE

D. Keith Jones (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 9-11, 13, 14, and 16. Claims 1-8, 12, and 18-21 have been canceled, and claims 15, 17, and 22 are withdrawn from consideration and are not part of this appeal. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

The Appellant's claimed invention is a safety line for preventing injury from falls from elevated positions during climbing and descending. Spec. 1:12-13. Claim 9, reproduced below, is representative of the subject matter on appeal.

9. A safety rope system for preventing injury to a user should the user fall from an elevated position, the user being supported in the elevated position by a platform, seat, or other device, the user not being supported by the safety rope system except in the case of a fall from, or failure of, the platform, seat, or other device, the safety rope system comprising:

a safety harness to be worn by the user;

a standing rope line for attachment to a tree, pole, or the like, with a first end of the standing rope line being adapted to be secured to the tree, pole, or the like; and

a sliding rope coupler for attaching the safety harness to the standing rope line, the sliding rope coupler comprising a length of rope with multiple loops wrapped about the standing line of rope to be slidable along at least a portion of the length of the standing rope line, with the sliding rope coupler having its ends joined together for attaching the safety harness thereadjacent, wherein said sliding rope coupler is freely repositionable along said standing rope line when not loaded, but resists sudden downward movement relative to said standing rope line when under load,

wherein the safety harness, the standing rope line, and the sliding rope coupler do not support the weight of the user except in the event that the platform, seat, or other device should fail or the user should fall off thereof.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Wagner	US 4,090,584	May 23, 1978
Van Patten	US 4,493,391	Jan. 15, 1985
Ascherin	US 6,059,266	May 9, 2000
Miller	GB 2 259 855 A	Mar. 31, 1993

The Appellant seeks review of the following Examiner's rejections:

1. Claims 9, 10, 14, and 16 under 35 U.S.C. § 102(b) as anticipated by Miller.
2. Claim 11 under 35 U.S.C. § 103(a) as unpatentable over Miller and Van Patten.

3. Claim 13 under 35 U.S.C. § 103(a) as unpatentable over Miller and Ascherin.
4. Claim 16 under 35 U.S.C. § 103(a) as unpatentable over Miller and Wagner.

The Appellant also requests that we consider the patentability of withdrawn claims 15 and 17 in view of the art of record. App. Br. 3, 5, 11. We decline to render an opinion as to the patentability of claims 15 and 17, which are not properly before us in this appeal.

ANTICIPATION REJECTION ISSUES

The Examiner found Miller anticipates the system of claims 9, 10, 14, and 16. Ans. 4. The Appellant contends that Miller does not anticipate claim 9 because it does not disclose the passive use of a sliding rope coupler as claimed. App. Br. 7. The Appellant also argues that Miller does not anticipate claim 16 because it does not disclose a belt harness. App. Br. 8.

The issues presented by this rejection are:

Has the Appellant shown the Examiner erred in finding that Miller anticipates the safety rope system of claim 9?

Has the Appellant shown the Examiner erred in finding that Miller discloses a safety harness comprising a belt, as recited in claim 16?

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Miller discloses a method and device for remotely lowering an incapacitated climber suspended by ropes. Miller 1, ll. 1-4.
2. Miller's device includes a first rope 1 hung over a branch of a tree, where one end 4 of the rope is tied to a karabiner 5, which is attached to a climber's harness 3, and the other end of the first rope 1 hangs toward the ground. Miller 3, l. 33 - 4, l. 4; Fig. 1.
3. Miller's device further includes a second rope 6 having its ends joined together and attached to the climber's harness 3 via a karabiner 8, where a length of the second rope 6 has multiple loops wrapped around the first rope 1 in a Prusik knot 9. Miller 4, ll. 4-11, Fig. 1.
4. Miller discloses that the device can be used by a climber to ascend and descend a tree as follows:

[W]hen a climber is suspended in the harness 3, the loop of rope formed by the first and second ropes suspend the climber. The climber can climb up the tree 10 by releasing some of the pressure on the second rope 6 enabling the prussic [*sic*] knot 9 to be slid up the first rope 1. This can be done by using one hand to pull on the first rope 1 whilst sliding the prussic [*sic*] knot 9 up with the other hand. To descend, the climber can simply apply a

pressure to the upper portion of the prussic [*sic*] knot 9 to release the grip of this knot on the first rope. In this manner a climber is able to ascend and descend an object to be climbed such as a tree 10 in a simple and safe manner.

Miller 4, ll. 12-24.

5. Miller discloses that the Prusik knot 9 “grips the first rope 1 when the second rope 6 has a load applied thereto” so that “if the climber should become in any way incapacitated and unable to apply the required downward pressure on the prussic [*sic*] knot 9, then the climber will remain suspended.” Miller 4, ll. 11-12 and 25-28.
6. Thus, Miller discloses that in order to move the knot 9 up or down the first rope, the user must release at least some of the pressure on the second rope so that the knot is not under load.
7. Miller also discloses that should the climber become incapacitated, akin to a fall from his position along the tree, the knot 9 will grip the first rope to break the climber’s fall and keep him suspended.
8. The harness 3 disclosed in Miller includes a belt. Miller, Fig. 1.
9. The Appellant does not contest the Examiner’s finding that progressive braking action is an inherent characteristic of a Prusik hitch. Ans. 5; App. Br. *passim*; Reply Br. *passim*.

PRINCIPLES OF LAW

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior

art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). To establish anticipation, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001). In other words, there must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. *Scripps Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991).

“It is well settled that the recitation of a new intended use for an old product does not make a claim to that old product patentable.” *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997) (citations omitted). Further, “[i]f ... the body of the claim fully and intrinsically sets forth the complete invention, including all of its limitations, and the preamble offers no distinct definition of any of the claimed invention's limitations, but rather merely states, for example, the purpose or intended use of the invention, then the preamble is of no significance to claim construction because it cannot be said to constitute or explain a claim limitation.” *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999) (citations omitted).

ANALYSIS

The Appellant argues claims 9, 10, and 14 as a group. App. Br. 5. As such, we select claim 9 as the representative claim, and claims 10 and 14

stand or fall with claim 14. 37 C.F.R. § 41.37(c)(1)(vii) (2008). We address claim 16 separately *infra*.

Miller discloses the identical structure as the safety rope system of claim 1. In particular, Miller shows a climber wearing a safety harness 3 (Fact 8). Miller's device includes a first rope 1 secured to a branch of a tree at one end and hanging freely toward the ground at the other end (Fact 2). Miller's device further includes a second rope 6 having its ends joined together and attached to the climber's harness 3, where a length of the second rope 6 has multiple loops wrapped around the first rope 1 in a Prusik knot 9 (Fact 3). Miller discloses that its Prusik knot 9 operates in the same manner as recited in claim 1, *viz.*, that it is freely repositionable along the standing rope line when not loaded, but resists sudden downward movement relative to the standing rope line when under load (Facts 4-7).

The Appellant distinguishes the claimed invention not by its structure but by the use to which the claimed system is put. In particular, the Appellant argues that Miller "discloses the use of a Prusik hitch for purposes other than what is claimed" and contends that "the Appellant has discovered that through the use of a Prusik hitch, an improved safety harness arrangement can be achieved." App. Br. 6. The Appellant explains that he has "discovered that the Prusik hitch becomes progressively tighter as the user falls, thereby providing a progressive braking action." App. Br. 6.

This progressive braking action is an inherent characteristic of the Prusik hitch (Fact 9). The Appellant has not asserted that his Prusik hitch differs in any way structurally from the Prusik hitch of Miller, and on the

contrary, the Appellant admits that he “has not invented the Prusik hitch.” App. Br. 6. The Appellant’s mere discovery of a new use for the known Prusik hitch and safety system of Miller is not sufficient to patentably distinguish the claimed structure from Miller’s device. *See In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

The Appellant further argues that in use the Miller rope and knot are constantly load-bearing and that Miller does not show passive use of a rope knot for arresting a fall. App. Br. 6-7 (directing the Board’s attention to the claim language that recites “wherein the safety harness, the standing rope line, and the sliding rope coupler do not support the weight of the user except in the event that the platform, seat, or other device should fail or the user should fall off thereof.”). Again, the claim language recites an intended use of the claimed safety system, that it is used only for passive fall arrest and not for climbing. The recitation of a particular use in the claim does not, however, distinguish the claimed safety system’s structure from the system disclosed in Miller.² Further, Miller discloses that its system is intended to arrest a climber’s fall such as when a climber becomes incapacitated during climbing (Facts 1, 5, 7).

² The recitations in the preamble that the user is supported in the elevated position by a platform, seat, or other device and that the user is not supported by the safety rope system except in the case of a fall from, or failure of, the platform, seat, or other device, are merely additional statements of intended use and do not constitute or explain any structural claim limitations in the body of the claim. *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999).

We also disagree with the Appellant's characterization of Miller's knot as being under "constant load" during use. As described in Miller, when using the rope for ascending or descending a tree, the load on the knot must be temporarily lifted periodically during ascent or descent so that the knot may be slid up or down the standing line rope (Facts 4, 6). If a user were to become incapacitated when the load on the knot had been lifted, the knot would operate in the same manner as the Appellant's to arrest the climber's fall from his position in the tree. As such, we find no error in the Examiner's rejection of claims 9, 10, and 14 as anticipated by Miller.

The Appellant further argues that claim 16 is separately patentable because Miller does not show the feature of the belt harness. App. Br. 8. Claim 16 does not recite, however, a "belt harness." Rather, claim 16 recites that the safety harness of claim 9 "comprises a belt." The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. *See Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376 (Fed. Cir. 2004). As such, claim 16 broadly covers any safety harness that includes a belt. Miller clearly shows in Figure 1 a climber wearing a harness 3 that includes a belt (Fact 8). As such, we find no error in the Examiner's rejection of claim 16 as anticipated by Miller.

OBVIOUSNESS REJECTIONS ISSUES

The Examiner found claims 11, 13, and 16 are unpatentable over Miller in view of Van Patten, Ascherin, and Wagner, respectively. The Appellant argues that Van Patten, Ascherin, and Wagner fail to cure the deficiencies of Miller and that Ascherin fails to disclose the sliding rope coupler is made from a rope that has a smaller diameter than the standing rope line, as recited in claim 13. App. Br. 8-10. The Appellant further submitted objective evidence of secondary considerations of non-obviousness. App. Br. 10-11; Declaration [of Bradley Fitzgerald] Under Rule 1.132 Regarding Secondary Considerations of Non-Obviousness, dated May 15, 2006 (Fitzgerald Decl.).

The issue presented by these rejections is:

Has the Appellant shown the Examiner erred in determining that the subject matter of claims 11, 13, and 16 would have been obvious in view of the teachings of Miller and Van Patten, Ascherin, or Wagner?

ADDITIONAL FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence.

10. Van Patten discloses a safety device for lowering a person from one height to a lower height including a life line 10 having a carabiner 14 used as a fastening device to fasten the line 10 to a

supporting structure. Van Patten, col. 1, ll. 5-7, col. 2, ll. 43-44;
Fig. 2.

11. Ascherin discloses a system for movement of loads including a cord 50 made of standard one-half inch static kermantle rope used throughout the Fire Rescue, and Urban Search and Rescue communities and a second cord 90 tied in the form of a “Prussick” [*sic.*] knot, which is connected to cord 50. Ascherin, col. 2, l. 66 – col. 3, l. 4 and col. 3, ll. 12-14.
12. Ascherin does not disclose the diameter thickness of the second cord 90. Ascherin, *passim*.
13. Ascherin discloses that Prusik knots are well-known in the art of mountaineering, and serve to grip or clamp down on cord 50 in the event of a malfunction on the winch side of pulley 20. Ascherin, col. 3, ll. 20-23.
14. The Prusik hitch works based on friction between the surface area of the Prusik rope and the surface area of standing line rope. As such, one having ordinary skill in the art would understand that the greater the difference between the diameter of the Prusik rope and the standing line rope, the greater the ability for the Prusik hitch to hold on the rope, and that the closer in size both ropes are, the less efficient the gripping power of the Prusik hitch.
15. Wagner discloses a workman 17 standing on an elevated scaffolding 18 and wearing a workman’s safety belt 19. Wagner, col. 2, ll. 65-68; Fig. 1.

16. The Summit product depicted in Exhibit 1 of the Fitzgerald Declaration does not have a clip attached to the end of the standing line rope. Fitzgerald Decl., Exhibit 1.
17. The Fitzgerald Declaration states that the North Starr Safety Line, Lone Wolf, Loggy Bayou, and Hunter Safety System products “include[] at least a sliding rope coupler comprising a [P]rusik hitch coupled to a standing rope line.” Fitzgerald Decl., paras. 5-8.
18. The depiction of the North Starr Safety Line product, shown in Exhibit 2 to the Fitzgerald Declaration, does not have a clip attached to the end of the standing line rope. Further, it is impossible to ascertain from the picture alone the relative diameters of the Prusik hitch rope to the standing line rope. Fitzgerald Decl., Exhibit 2.
19. The depiction of the Lone Wolf product, as shown and described in Exhibit 3 to the Fitzgerald Declaration, does not have a clip attached to the end of the standing rope line. Fitzgerald Decl., Exhibit 3, page 2 (Climber Use instructions) and page 3 (Tree Attachment Rope instructions). It is impossible to ascertain from the pictures alone the relative diameters of the Prusik hitch rope to the standing line rope in the Lone Wolf product. Fitzgerald Decl., Exhibit 3.
20. It is impossible to ascertain from the depiction of the Loggy Bayou safety line product, as shown in Exhibit 4 to the Fitzgerald Declaration, whether the product has a clip attached to the end of

the standing rope line or the relative diameters of the Prusik hitch rope to the standing rope line. Fitzgerald Decl., Exhibit 4.

21. It is impossible of us to decipher from the depiction of the Hunter Safety System product, as shown in Exhibit 5 to the Fitzgerald Declaration, whether the product has a clip attached to the end of the standing rope line or the relative diameters of the Prusik hitch rope to the standing rope line. Fitzgerald Decl., Exhibit 5.

PRINCIPLES OF LAW

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, ___, 127 S. Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at ___, 127 S. Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”)

The Examiner has the initial burden of showing a *prima facie* case of obviousness, and the Appellant has the burden on appeal to the Board to

demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“[t]o reject claims in an application under section 103, an examiner must show an unrebutted *prima facie* case of obviousness.... On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

When the Appellant provides rebuttal evidence, the Board must start anew and weigh the evidence upon which the earlier conclusion of obviousness was reached against the facts established by the rebuttal evidence to reach a legal conclusion of obviousness or non-obviousness. *See In re Piasecki*, 745 F.2d 1468, 1472-73 (Fed. Cir. 1984) and *In re Rinehart*, 531 F.2d 1048, 1052 (CCPA 1976).

To be given substantial weight in the determination of obviousness or non-obviousness, evidence of secondary considerations must be relevant to the subject matter as claimed, and therefore the examiner must determine whether there is a nexus between the merits of the claimed invention and the evidence of secondary considerations. *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 305 n.42 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986). In particular, an applicant asserting secondary considerations to support its contention of non-obviousness bears the burden of proof of establishing a nexus between the claimed invention and evidence

of secondary considerations. For example, in the case of evidence of commercial success, the Federal Circuit has acknowledged that the applicant bears the burden of establishing a nexus, stating:

In the ex parte process of examining a patent application, however, the PTO lacks the means or resources to gather evidence which supports or refutes the applicant's assertion that the sale constitutes commercial success. *C.f. Ex parte Remark*, 15 USPQ2d 1498, 1503 (Bd. Pat. App. & Int. 1990)(evidentiary routine of shifting burdens in civil proceedings inappropriate in ex parte prosecution proceedings because examiner has no available means for adducing evidence). Consequently, the PTO must rely upon the applicant to provide hard evidence of commercial success.

In re Huang, 100 F.3d 135, 139-40 (Fed. Cir. 1996). *See also In re GPAC*, 57 F.3d 1573, 1580 (Fed. Cir. 1995); *In re Paulsen*, 30 F.3d 1475, 1482 (Fed. Cir. 1994) (Evidence of commercial success of articles not covered by the claims subject to the obviousness rejection was not probative of non-obviousness).

Objective evidence of non-obviousness, including commercial success, must be commensurate in scope with the claims. *In re Tiffin*, 448 F.2d 791 (CCPA 1971) (evidence showing commercial success of thermoplastic foam “cups” used in vending machines was not commensurate in scope with claims directed to thermoplastic foam “containers” broadly). In order to be commensurate in scope with the claims, the commercial success must be due to claimed features, and not due to unclaimed features.

Joy Technologies Inc. v. Manbeck, 751 F. Supp. 225, 229 (D.D.C. 1990), *aff'd*, 959 F.2d 226, 228 (Fed. Cir. 1992) (Features responsible for commercial success were recited only in allowed dependent claims, and therefore the evidence of commercial success was not commensurate in scope with the broad claims at issue.). Gross sales figures do not show commercial success absent evidence as to market share, *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1026-27 (Fed. Cir. 1985), or as to the time period during which the product was sold, or as to what sales would normally be expected in the market, *Ex parte Standish*, 10 USPQ2d 1454, 1458 (BPAI 1988).

With regard to evidence of copying by others, “more than the mere fact of copying by an accused infringer is needed to make that action significant to a determination of the obviousness issue.” *Cable Electric Products*, 770 F.2d at 1028.

ANALYSIS

Rejection of claim 11 as unpatentable over Miller and Van Patten

Claim 11 depends from claim 9 and further recites “wherein said standing rope line comprises a clip.”

Van Patten discloses a safety device for lowering a person from one height to a lower height including a life line 10 having a carabiner 14 used as a fastening device to fasten the line 10 to a supporting structure (Fact 10). The Examiner determined that it would have been obvious to provide the rope line 1 of Miller with a clip, as taught by Van Patten, to form a loop with

his line. Ans. 4. The Appellant does not contest the Examiner's rationale for combining the teachings of Miller and Van Patten or the Examiner's finding as to the scope and content of Van Patten. Rather, the Appellant argues that Van Patten fails to cure the deficiencies of Miller because Van Patten fails to disclose, teach, or suggest the passive use of a sliding rope coupler or Prusik knot. As we found *supra*, in our analysis of claim 9, Miller has no deficiencies in this regard, as it discloses the use of a sliding rope coupler and Prusik knot to arrest a climber's fall. As such, the Appellant has not shown the Examiner erred in setting forth a *prima facie* case of obviousness.

We now consider anew the issue of obviousness, carefully evaluating and weighing both the evidence relied upon by the Examiner and the objective evidence of non-obviousness provided by the Appellant. In particular, we consider the evidence set forth in the Fitzgerald Declaration and accompanying Exhibits as it pertains to the obviousness of the subject matter of claim 11. We note at the outset that neither the Summit product nor the competitors' products referenced in the Fitzgerald Declaration appear to have a clip attached to the standing rope line (Facts 16-21). Thus, neither the evidence of sales of Summit's own product, nor the evidence of copying by competitors' products, has a nexus to the invention as claimed in claim 11.

We now examine the Appellant's evidence of commercial success. The declarant offered evidence of actual sales of Summit's adjustable safety ropes and Summit's treestands and harnesses, which each incorporate the

adjustable safety rope. Fitzgerald Decl., para. 4. As we explained, because Summit's adjustable safety rope, as shown in Exhibit 1, does not include a clip on the standing rope line, the evidence of commercial sales has no nexus to the invention of claim 11 such that the evidence is not commensurate with the claimed invention. Further, the evidence of sales of Summit's treestands and harnesses is even less related to the claimed safety system because the Appellant has offered insufficient evidence to show that these sales are due to the nature of the claimed invention, as opposed to other economic and commercial factors unrelated to the technical quality of the claimed subject matter. In other words, because the claimed safety system was sold along with treestands and harnesses, the consumers could have decided to purchase these products based on desirable features other than the claimed subject matter.

Even if we were to find a sufficient nexus between this evidence of commercial success and the claimed invention, the Appellant has failed to provide persuasive evidence as to market share so as to put the evidence of gross sales figures into perspective in the context of the particular market at hand. *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (without evidence that the sales are a substantial quantity in the relevant market, "bare sales numbers" are a "weak showing" of commercial success, if any); *In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991) ("[I]nformation solely on numbers of units sold is insufficient to establish commercial success."); *Kansas Jack, Inc. v. Kuhn*, 719 F.2d 1144, 1150-51 (Fed. Cir. 1983) ("The evidence of commercial success consisted solely of the number of units sold.

There was no evidence of market share, of growth in market share, of replacing earlier units sold by others or of dollar amounts, and no evidence of a nexus between sales and the merits of the invention. Under such circumstances, consideration of the totality of the evidence, including that relating to commercial success, does not require a holding that the invention would have been nonobvious at the time it was made to one skilled in the art.”).

As to the evidence of purported competitor copying, because the competitors’ safety rope products do not appear to include a clip on the standing rope line, the evidence of copying has no nexus to the invention of claim 11 such that the evidence is not commensurate with the claimed invention (Facts 18-21). Even if we were to find a nexus, the evidence submitted is insubstantial evidence of non-obviousness because the Appellant has not adequately shown the competitors copied Summit’s product despite the failure of protracted efforts by the copyists to design a similar device, or that the competitors’ decision to copy was not simply out of a general lack of concern for patent property on the part of the competitor companies. *See Cable Electric Products*, 770 F.2d at 1028.

We agree with the Examiner that the structure disclosed in Miller is identical to the system of claim 11 except for the clip and that one having ordinary skill in the art would have had a rationale reason to add the clip of Van Patten to the standing rope line of Miller to provide an easy way to form a loop with his line. We further find that the evidence of commercial success and copying has no nexus to the subject matter of claim 11 and is at

best a weak showing of non-obviousness. Having now considered all the evidence presented by Appellant against obviousness and weighing all the evidence anew, it is our conclusion that the evidence for obviousness outweighs the evidence against obviousness. *See In re Fenton*, 451 F.2d 640, 643 (CCPA 1971) (the court balanced the Patent Office's case against the strength of appellant's objective evidence of non-obviousness.) Based on our review and consideration of all of the evidence before us, we conclude that the subject matter of claim 11 would have been obvious to one having ordinary skill in the art at the time the invention was made in view of Miller and Van Patten.

Rejection of claim 13 as unpatentable over Miller and Ascherin

Miller shows the claimed system except for the sliding rope coupler being of a smaller diameter than that of the standing rope line. Ascherin discloses a system for movement of loads including a cord 50 made of standard one-half inch rope and a second cord 90 tied in the form of a Prusik knot, which is connected to cord 50 (Fact 11). Ascherin does not disclose the diameter thickness of the second cord 90 (Fact 12). Ascherin discloses that Prusik knots are well-known in the art of mountaineering, and serve to grip or clamp down on cord 50 in the event of a malfunction on the winch side of pulley 20 (Fact 13). The Prusik hitch generally, and in the case of both Miller and Ascherin, works based on friction between the surface area of the Prusik rope and the surface area of standing line rope. As such, one having ordinary skill in the art would understand that the greater the

difference between the diameter of the Prusik rope and the standing line rope, the greater the ability for the Prusik hitch to hold on the rope, and that the closer in size both ropes are, the less efficient the gripping power of the Prusik hitch (Fact 14). Based on this understanding in the art of general engineering principles, it would have been obvious to one of ordinary skill in the art to make the sliding rope coupler of a smaller diameter than that of the standing rope line, as recited in claim 13, to improve the gripping power of the Prusik hitch.

We now consider anew the issue of obviousness, carefully evaluating and weighing both the evidence relied upon by the Examiner and the objective evidence of non-obviousness provided by the Appellant. In particular, we consider the evidence set forth in the Fitzgerald Declaration and accompanying Exhibits as it pertains to the obviousness of the subject matter of claim 13.

The declarant offered evidence of actual sales of Summit's adjustable safety ropes and Summit's treestands and harnesses, which each incorporate the adjustable safety rope. Fitzgerald Decl., para. 4. Although not described explicitly in the Fitzgerald Declaration, it appears from the photograph in Exhibit 1 that the diameter of the Prusik knot line of Summit's product is smaller than the standing rope line. The Appellant has failed, however, to adequately show that the commercial sales of Summit's product have a nexus to this claimed feature of claim 13. Further, the evidence of sales of Summit's treestands and harnesses are even less related to the claimed safety system because the Appellant has offered insufficient evidence to show that

these sales are due to the nature of the claimed invention, as opposed to other economic and commercial factors unrelated to the technical quality of the claimed subject matter. In other words, because the claimed safety system was sold along with treestands and harnesses, the consumers could have decided to purchase these products based on desirable features other than the claimed subject matter. Even if we were to find a sufficient nexus between this evidence of commercial success and the claimed invention, the Appellant has failed to provide persuasive evidence as to market share so as to put the evidence of gross sales figures into perspective in the context of the particular market at hand.

As to the evidence of copying, the Appellant has failed to adequately show that any of the competitors' safety rope products actually copy the claimed product feature of claim 13 (Facts 17-21). As such, the evidence of copying has no nexus to the invention of claim 13 such that the evidence is not commensurate with the claimed invention. Even if we were to find a nexus, the evidence submitted is insubstantial evidence of non-obviousness because the Appellant has not adequately shown the competitors copied Summit's product despite the failure of protracted efforts by the copyists to design a similar device, or that the competitors' decision to copy was not simply out of a general lack of concern for patent property on the part of the competitor companies.

The structure disclosed in Miller is identical to the system of claim 13 except for the relative diameters of the sliding rope coupler and the standing rope line. Based on the function of the sliding rope lines in Miller and

Ascherin and the fact that under general engineering principles, one of ordinary skill in the art would know that it is desirable to have a difference in diameters of the two lines to get a better frictional engagement and gripping, it would have been obvious to use a smaller diameter sliding rope coupler to improve the gripping power of the Prusik knot. We further find that the evidence of commercial success and copying has no nexus to the subject matter of claim 11 and is at best a weak showing of non-obviousness. Having now considered all the evidence presented by Appellant against obviousness and weighing all the evidence anew, it is our conclusion that the evidence for obviousness outweighs the evidence against obviousness. Based on our review and consideration of all of the evidence before us, we conclude that the subject matter of claim 13 would have been obvious to one having ordinary skill in the art at the time the invention was made in view of Miller and Ascherin.

Rejection of claim 16 as unpatentable over Miller and Wagner

As we found *supra*, both Miller and Wagner disclose safety harnesses comprising a belt (Facts 8 and 15). Because Miller alone anticipates claim 16, the subject matter of claim 16 is also obvious in view of the prior art. A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for anticipation is the epitome of obviousness. See *In re Pearson*, 494 F.2d 1399, 1402 (CCPA 1974); and *In re Fracalossi*, 681 F.2d 792, 794 (CCPA 1982).

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CONCLUSIONS

The Appellant has failed to show the Examiner erred in rejecting claims 9, 10, 14, and 16 under 35 U.S.C. § 102(b) as anticipated by Miller.

The Appellant also failed to show the Examiner erred in determining that the subject matter of claims 11, 13, 16 would have been obvious in view of Miller and Van Patten, Ascherin, or Wagner.

DECISION

The decision of the Examiner to reject claims 9, 10, 11, 13, 14, and 16 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

ewh

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